85-962

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE A. HERSHEY, JR.,
Staff Sergeant, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. WHETHER an accused is denied a public trial when the court is closed during the testimony of the prosecutrix without a determination on the record that the closure is justified by overriding public interest.

2. WHETHER the *per se* prejudice rule endorsed by *Waller v. Georgia* applies when the court is closed for a portion of the trial on the merits.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	8
Appendix A	1a
Appendix B	10a

TABLE OF AUTHORITIES

Cases:

Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975), *cert. denied*, 423 U.S. 878 (1975)	5
Commonwealth v. Contakos, 453 A.2d 578 (Pa. 1982)	5
Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984), *cert. denied*, —— U.S. —— (1985)	5
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)	7
In re Oliver, 333 U.S. 257 (1948)	5
People v. Jones, 47 N.Y.2d 409, 391 N.E.2d 1335 (1979)	6
Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)	5, 6
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	5
United States ex rel. Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969)	7
United States v. Brown, 7 USCMA 251, 22 CMR 41 (1956)	5
United States v. Grunden, 2 M.J. 116 (CMA 1977)	5, 6

TABLE OF AUTHORITIES—Continued

Page

United States v. Hershey, 20 M.J. 433 (CMA 1985) 1, 3, 4
United States v. Hershey, 17 M.J. 973 (ACMR 1984) 1
Waller v. Georgia, 467 U.S. —— (1984) 4, 5, 6, 7, 8

Constitution and Statutes:

U.S. Const. Amend. VI 2
Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982):
Article 80 2
Article 120 2
Article 125 2
Article 134 2
28 U.S.C. § 1259 1

IN THE

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LAWRENCE A. HERSHEY, JR.,
Staff Sergeant, United States Army,
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v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Lawrence A. Hershey, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 20 M.J. 433 (CMA 1985) (Appendix A). The opinion of the Army Court of Military Review is reported at 17 M.J. 973 (ACMR 1984) (Appendix B).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on October 7, 1985, affirming petitioner's conviction of September 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ."

STATEMENT OF THE CASE

In March 1982, petitioner moved to Fort Polk, Louisiana, with his wife and four children. During May and June of that year, petitioner's wife was hospitalized for approximately one month at Fort Sam Houston, Texas. On 11 June 1982, petitioner's thirteen-year-old daughter, Diana Hershey, reported to a neighbor that her father had sexually molested her the preceding evening. Subsequent investigation produced additional allegations of sexual molestation throughout the period of Mrs. Hershey's hospitalization.

Petitioner was tried by a general court-martial on 2 and 3 September 1982, on charges of carnal knowledge, sodomy with a child under the age of 16, and lewd and lascivious acts with a female under the age of 16, in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. §§ 920, 925, and 934 (1982), respectively. Contrary to his pleas, petitioner was convicted as charged except that the military judge found petitioner guilty of attempted sodomy with a child under the age of 16, in violation of Article 80, UCMJ, 10 U.S.C. § 880 (1982). Petitioner was sentenced to a bad-conduct discharge from the Army, confinement at hard labor for five years, forfeiture of all pay and allowances, and reduction to the grade of Private E-1.

After both counsel completed their opening statements, trial counsel moved to clear the courtroom of all spectators and to post the bailiff outside the courtroom door

while Diana Hershey testified.[1] The defense counsel objected.[2] In response to the military judge's inquiry regarding the purpose, the trial counsel stated that he wanted to create an environment which was conducive to the witness' relaxation.[3] The military judge granted the government's motion. The only persons permitted to be in attendance were the military judge, the court reporter, the trial counsel, the petitioner, his defense counsel, and Diana Hershey's social worker.[4] (R. 66-67).

In acting on the government's motion, the military judge did not hold an evidentiary hearing, did not ask for or receive any citations to legal authority, did not make any findings of fact, and did not state any reasons for his decision (R. *id.*). It is unknown whether anyone attempted to enter the courtroom during Diana Hershey's

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[1] The trial counsel noted that the only person to be removed other than the bailiff was the petitioner's escort. Use of an escort is a common practice in courts-martial. An escort is the representative of the unit commander and is responsible for getting the accused to the courtroom on time and in the proper uniform, taking and returning the accused to and from the unit dining facility, and, if the accused is convicted and sentenced to confinement, taking the accused into immediate custody. He normally has no official functions during the trial itself, and may wait in the general vicinity of the courtroom or attend the trial, as he desires.

[2] Before the United States Court of Military Appeals, the government urged that petitioner waived the issue by failing to more fully articulate the basis of the objection. The court clearly rejected this contention. United States v. Hershey, 20 M.J. 433, 437 (CMA 1985).

[3] The military judge specifically asked the trial counsel if the witness would be reluctant to testify. The trial counsel declined to make such an assertion and stated that it was an embarrassing situation and that he wished to reduce that embarrassment as much as possible.

[4] The social worker was not in attendance at the time of the motion, but accompanied Diana Hershey into the courtroom and remained throughout her testimony (R. 99). This was permitted as part of the trial counsel's efforts to create a relaxed atmosphere for the witness.

testimony. Her testimony was the only direct evidence produced by the government (R. 67-99). The balance of the government's case consisted of the testimony of a neighbor (the first adult to whom Diana Hershey made her allegations) (R. 99-110), two medical experts whose examinations led to the conclusion that Diana Hershey was sexually active (R. 110-122, 122-128), and a Criminal Investigation Division agent who testified regarding statements made by petitioner (R. 128-135). The defense case, in essence, was a denial of the charges and an attempt to establish that Diana Hershey's allegations were fabrications. The issue thus was one of credibility.

The issue granted by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER, OVER HIS OBJECTION, APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

REASONS FOR GRANTING THE WRIT

The United States Court of Military Appeals held that petitioner was not denied a public trial even though it determined that the military judge erred by closing the court without careful inquiry into whether closure was necessary. This seemingly anomalous result derives from the court's categorization of the closure as "a partial closure, rather than a blanket closure, of the entire hearing." *United States v. Hershey*, 20 M.J. 433, 437 (CMA 1985). The court then proceeded to examine the particular facts of this case rather than apply the *per se* prejudice rule this Honorable Court endorsed in *Waller v. Georgia*, 467 U.S. ——, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

Under the decision of the court below, a summary decision to close substantial portions of a court-martial over an accused's objection is not a denial of the constitutional

right to a public trial. The decision is wholly inconsistent with the decisions of this Honorable Court as well as other long-standing federal and military precedent. Furthermore, it sanctions the trial court's substantial departure from the accepted and usual course of judicial proceedings.

The Sixth Amendment right to a public trial was the Founding Fathers' response to the abuses of the Spanish Inquisition, the English Court of Star Chamber, and the *lettre de cachet* used by the French monarchy. *See In re Oliver*, 333 U.S. 257 (1948). It is such a fundamental part of our legal heritage that this Honorable Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.* at 266 (footnote omitted). This observation continues to be true as courts at all levels in all jurisdictions have consistently recognized, in one way or another, that "[c]losed trials are the mechanics of tyranny." *Commonwealth v. Contakos*, 453 A.2d 578, 582 (Pa. 1982).

Clearly, under its own precedents, *United States v. Grunden*, 2 M.J. 116 (CMA 1977); *United States v. Brown*, 7 USCMA 251, 22 CMR 41 (1956), and those of this Honorable Court, *Waller v. Georgia*, *supra*; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *In re Oliver*, *supra*, the United States Court of Military Appeals was correct in finding that the trial judge erred. The issue then becomes whether the Court was correct in determining that petitioner was not denied a public trial, notwithstanding the fact that the court was improperly closed during the testimony of the primary government witness. In making this determination the court erroneously relied upon *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1170, 84 L.E.2d 321 (1985) and *Aaron v. Capps*, 507 F.2d 685 (5th Cir. 1975), *cert. de-*

nied, 423 U.S. 878 (1975). While both these cases were partial rather than blanket closures, they were partial only in the sense that not all the public was excluded. In both cases the defendants were permitted to have relatives, friends, and, most importantly, the press in attendance. The constitutional requirement for a public trial having been satisfied, the courts could then look to the particular facts to determine if the defendants were otherwise prejudiced by the partial closure.

In the instant case, the closure was "partial" in the sense that the court was closed only during the testimony of the prosecutrix. It was, however, *totally* closed for that period. Thus, the case is akin to *Waller v. Georgia*, *supra* (court closed during a seven day suppression hearing, but trial on the merits was open to the public), and *Press-Enterprise Co. v. Superior Court*, *supra* (court closed during *voir dire* proceedings). *See also United States v. Grunden*, *supra* (national security interest case in which over 60 percent of the trial was open to the public). The instant case is virtually identical to *People v. Jones*, 47 N.Y.2d 409, 391 N.E.2d 1335 (1979), a case in which the court was summarily closed during the testimony of a single witness. The appellate court had little difficulty applying the generally accepted and long-standing *per se* prejudice rule, notwithstanding the fact that the closure involved only one witness whose testimony was consistent with that of another witness who testified in open court. 391 N.E.2d at 1339-41.

Certainly the closure in the instant case, in terms of duration, differs from those previously considered by this Court. As noted by the court below, the trial was closed for approximately one hour. This one hour, however, represented the very essence of the government's case—the testimony of the prosecutrix pitted against that of her father. The lack of opportunity for the public, including the press, to scrutinize the testimony of the prosecutrix, as well as the actions of the military judge

and the trial counsel, failed to meet the minimal standards required of a public trial. Whether the public was or was not clamoring to attend is irrelevant. It was the *opportunity* for the public to attend which was denied to petitioner. *See United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969); *cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (Massachusetts statute mandating exclusion of the public from certain minor victim sex offense trials held to violate First Amendment).

A rule which turns on whether members of the public are in fact excluded should not be sustained for two reasons. First, the fact that a witness knows that a trial is open to the public and that spectators may enter during the witness' testimony may have the same salutary effect upon the testimony that the actual presence of spectators would have. Conversely, the knowledge that potential spectators are excluded promotes an atmosphere conducive to perjury, precisely the condition the Sixth Amendment was designated to prevent. Secondly, such a rule would undermine the *per se* prejudice rule which this Court endorsed in *Waller v. Georgia*, *supra*. An accused has no reasonable means by which to determine whether potential attendees were deterred from attending or whether actual attendees were barred at the door. As the Court stated in *United States ex rel. Bennett v. Rundle*, *supra*, such a rule would require a defendant "to prove what the disregard of his constitutional right has made it impossible for him to learn." *Id.* at 608.

CONCLUSION

The summary treatment of the motion to close the trial in the instant case fails to minimally comply with the long history of unbroken precedent designed to ensure that any diminution of the constitutional right to public trial be justified by public necessity. The United States Court of Military Appeals, contrary to the precedent of this Honorable Court as well as its own, erroneously categorized the closure as partial. In reaching its decision, the court below failed to consider the relative importance of the closed portion of the trial. Its decision vitiates the *per se* prejudice rule prevailing throughout federal and state jurisprudence and endorsed by this Honorable Court in *Waller v. Georgia, supra.* The questions presented are substantial and significant to civilian and military jurisprudence as they involve a fundamental constitutional right. Accordingly, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 49,457
CM 443208

UNITED STATES,
Appellee,

v.

LAWRENCE A. HERSHEY, JR.,
Staff Sergeant U.S. Army,
Appellant.

Oct. 7, 1985

For Appellant: *Lieutenant Colonel Paul J. Luedtke* (argued); *Colonel William G. Eckhardt* and *Captain Frank J. DiGiammarino* (on brief); *Lieutenant Colonel Arthur L. Hunt* and *Major Robert M. Ott.*

For Appellee: *First Lieutenant Tarek Sawi* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Patrick M. Flachs* (on brief); *Captain Paul E. Jordan.*

OPINION OF THE COURT

COX, Judge:

Contrary to his pleas at a general court-martial, appellant was convicted by a military judge sitting alone of attempted sodomy; carnal knowledge; and lewd and lascivious acts, all involving his minor daughter, in violation of Articles 80, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 920, and 934, respectively.

His sentence to confinement for 5 years, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge was approved by the convening authority and affirmed by the Court of Military Review. 17 M.J. 973 (1984).

We granted review of the following issue:

> WHETHER, OVER HIS OBJECTION, APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

While the procedures employed in this trial are unworthy of emulation, we conclude that the partial closure of the trial under the circumstances of this case did not deprive appellant of a public trial.

This two-day trial commenced at 0915 hours, September 2, 1982, at Fort Polk, Louisiana. After approximately two hours spent on preliminary matters and a motion to suppress appellant's pretrial confession, trial proceeded on the merits. Trial counsel commented in his opening statement that the complaining witness, appellant's 13-year-old daughter, would "be somewhat timid or a little bit uncomfortable" when testifying to the sexual abuse inflicted upon her by her father. Defense counsel also described the witness as "timid," "reserved" and "difficult to interview," but attributed these characteristics to her lack of credibility.

After both counsel completed their opening statements, trial counsel requested that the courtroom be closed during the testimony of his first witness:

> TC: Your Honor, we would like to call our first witness, Miss [DH]. And at this time, Your Honor, we note that there's only two spectators in the courtroom, one being the bailiff and the other being Staff Sergeant Raskin, but that they both be removed and the bailiff asked to stand outside the door during the time she is here to testify.

MJ: Defense.

DC: Well—object, Your Honor. There's—there are purposes for the bailiff and the escort and they're sitting in the rear of the room. There's no need for such a move.

MJ: What is your purpose in requesting it?

TC: Your Honor, our purpose is simply to create an environment which is probably more conducive to the relaxation of Miss [DH], believing that it will be—her testimony will be easier to give once we reduce the number of individuals listening. And we would like to limit that to the military judge, the court reporter, and the members of the trial defense counsel and the accused and Miss [H]'s social worker.

MJ: Is it your position that she's going to be reluctant to testify with spectators?

TC: Your Honor, it's our position that this is—what she's about to do is an embarrassing situation for her and would be for any female to have to testify to some of the things that she's about to testify to. And the government submits that we would like to reduce, as much as possible, that embarrassment.

MJ: Do you have anything further?

DC: Well only that she has told this story repetitively, Your Honor, in front of adults and I see—this is not substantially different.

MJ: Okay. I'm going to grant the government's request and order the bailiff and the escort out of the courtroom. And if you would ensure that no one enters until Miss [H] leaves the courtroom.

The bailiff and appellant's escort departed the courtroom and DH entered, apparently accompanied by her social worker. Her testimony lasted less than an hour.

The Court of Military Review held that the closure of the court during the witness' testimony "was not an abuse of discretion" in view of the age of the witness, the nature of the charges, the lack of a jury, and the relationship between the witness and appellant. The court concluded that the military "judge properly balanced the right of the appellant to a public trial against the right of the . . . witness to be spared undue embarrassment." 17 M.J. at 974. There is little support in the record for the court's *post hoc* assertions, however, as no evidence was presented on the motion and the military judge made no findings. Thus, we are left to speculate why trial counsel's request was granted, particularly in view of the fact that only two persons were present to exclude from the courtroom.

Without question, the sixth-amendment[1] right to a public trial is applicable to courts-martial. *United States v. Grunden*, 2 M.J. 116 (C.M.A.1977); *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).[2] A public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury. *Waller v. Georgia*, 467 U.S. ——, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). Although the right to a public trial is not absolute and the trial judge has authority to close limited portions of a trial over defense objection, closure of the court must be done "sparingly with the emphasis always toward a public trial."[2] *United States v. Grunden, supra* at 120. This

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[1] The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

[2] Like paragraph 53*e* of the Manual for Courts-Martial, United States, 1969 (Revised edition), R.C.M. 806 of the Manual for Courts-Martial, United States, 1984, sets forth the principle that court-martial proceedings will "be open to the public" except under very limited circumstances.

Court held in *Grunden* that, even when the interest sought to be protected is national security, the Government must *demonstrate* a compelling need to exclude the public from a court-martial over defense objection, and the mere utterance by trial counsel of a conclusion is not sufficient.

In addition to the sixth-amendment right of an accused to a public trial, the Supreme Court has held that the press and general public have a constitutional right under the first amendment to access to criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). In *Waller v. Georgia*, *supra*, the Supreme Court applied the same test to a defendant's objection to closure of a suppression hearing as had been applied in first-amendment cases, stating "that the explicit [s]ixth [a]mendment right of the accused is no less protective of a public trial than the implicit [f]irst [a]mendment right of the press and public." 104 S.Ct. at 2215. The stringent test to be met before closure of a criminal trial to the public is set out in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), to wit: the party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review.

Here, that test was not met.[3] The same procedure condemned in *Grunden* was employed, as trial counsel merely stated his position, and the military judge acquiesced in his request. No evidentiary hearing was held to determine, for example, whether this particular witness was unduly embarrassed; whether she was unable to testify

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[3] Of course, the military judge did not have the benefit of the Supreme Court decisions in *Waller v. Georgia*, —— U.S. ——, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), at the time of trial.

coherently with the court open; whether there were any alternatives to closure; or even whether the witness desired closure.

In spite of the dearth of information available to aid in review, the Government argues that it was unnecessary to place more on the record because the reason for closure is self-evident and valid—that is, to protect the victim from potential embarrassment. While it may be permissible under certain circumstances to exclude spectators during the testimony of a victim of tender years, that must be decided on a case-by-case basis and not based on the mere utterance of the word "embarrassment" as was done here. As this Court stated almost 30 years ago, "Undeniably there is a certain amount of mortification imposed on victim-witnesses in sex cases, but that is a condition which cannot be eliminated from our judicial system." *Brown v. United States*, *supra* 7 U.S.C.M.A. at 259, 22 C.M.R. at 49. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609, 102 S.Ct. 2613, 2621, 73 L.Ed.2d 248 (1982) (determination must be made "on a case-by-case basis whether" closure in a sex case is necessary to protect the welfare of a minor victim). "Among the factors to be weighed" in determining whether closure is necessary are the age of the witness, "psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608, 102 S.Ct. at 2621 (footnote omitted).

The Government argues that even if the military judge erred in closing the court-martial without determining the necessity for such a measure, appellant waived the issue by failing to more fully articulate the basis of his objection. Although an accused may waive the right to a public trial, *Singer v. United States*, 380 U.S. 24, 34-35, 85 S.Ct. 783, 789-790, 13 L.Ed.2d 630 (1965), we refuse to apply the doctrine of waiver in this case. Appellant did specifically object to closure of the court. Because a

constitutional right was involved, any waiver must be "intentional and knowing." *Martineau v. Perry*, 601 F.2d 1196, 1200 (1st Cir.1979); *see Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Once denial of the constitutional right to a public trial has been established, appellant is not required to prove specific prejudice in order to obtain relief. *Waller v. Georgia*, *supra*.[4] We do not believe, however, that appellant was denied a public trial in this case. Even though the military judge erred in closing the court without careful inquiry into whether it was necessary, that does not establish that denial of a public trial has occurred. That determination must be based on the particular facts of the case. *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985); *Aaron v. Capps*, 507 F.2d 685

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[4] *See State v. Sheppard*, 182 Conn. 412, 418, 438 A.2d 125, 128 (1980) ("prejudice must . . . be implied" because of "practical impossibility" of demonstrating prejudice); *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979) (requiring a showing of prejudice because of exclusion would destroy the safeguard); *Martineau v. Perrin*, 601 F.2d 1196, 1198 (1st Cir. 1979) (question of prejudice immaterial when "conviction not had in public proceedings"); *People v. Jones*, 47 N.Y.2d 409, 416, 418 N.Y.S.2d 359, 364, 391 N.E.2d 1335, 1340 (1979) (harmless error rule cannot be applied to "intangible, societal loss that flows from" closure of the court); *United States v. Eisner*, 533 F.2d 987, 993 (6th Cir.), *cert. denied*, 429 U.S. 919, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976) ("affirmative showing" of harm "is unnecessary to justify reversal" when defendant denied public trial); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (requiring proof of prejudice would force accused "to prove what the disregard of his constitutional right has made it impossible for him to learn"); *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949) (public-trial guarantee illusory if actual prejudice required, as in most cases "it would be difficult if not impossible . . . to point to any definite, personal injury"); *Davis v. United States*, 247 Fed. 394, 398-99 (8th Cir. 1917) (prejudice implied when constitutional right to public trial is violated).

(5th Cir.), *cert. denied*, 423 U.S. 878, 96 S.Ct. 153, 46 L.Ed.2d 112 (1975).

This case involved only a partial closure, rather than a blanket closure, of the entire hearing, as was the case in *Waller*. The press and public were specifically excluded for the full seven days of a suppression hearing in *Waller* even though only a small portion (2½ hours) involved matter that the prosecution had an interest in protecting. Here, the closure was limited to less than an hour and to the testimony of one witness, albeit the chief witness for the prosecution. More importantly, it appears that the only person present in the courtroom other than the accused and court personnel when trial counsel made his exclusionary motion was appellant's escort. The two people asked to leave the courtroom, then, were not there as spectators, but to perform a governmental function. Therefore, the practical impact of the closure was minimal.

Although trial had been in progress for approximately two hours at the time of the ordered closure, no friends, relatives, members of the press, or members of the general public were present in the courtroom.[5] The public-trial guarantee only provides that the public be allowed to attend, not that the public actually be in attendance. There is no evidence that members of the public were actually barred entry during the short period when the bailiff was asked to prohibit spectators from entering the courtroom. Appellant did not indicate that he was expecting anyone to attend, and we are unwilling to presume that members of the general public desiring entry suddenly appeared at the courtroom door during the brief

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[5] The social worker apparently entered with the witness and remained during her testimony. Appellant's wife testified as a defense witness on the merits and likely would not have been permitted in the courtroom except when testifying. *See* para. 53*f*, 1969 *Manual*, *supra*.

portion of this two-day trial when entry would have been barred.[6] Under the unique circumstances of this case, it can be determined from the record that appellant received the safeguards of a public trial in spite of the exclusion over his objection of two persons performing official functions during the testimony of a witness. Thus, we find no constitutional violation. and the granted issue must be decided adversely to appellant.

The decision of the United States Army Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

Judge FLETCHER did not participate.

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[6] It was stated in oral argument that it is the practice in some military courts to bar admittance of spectators except during a recess. Employment of such a procedure is a denial of public access to courts-martial and should be discontinued.

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

CM 443208

UNITED STATES,
Appellee,

v.

STAFF SERGEANT LAWRENCE A. HERSHEY, JR.,
SSN 210-40-0692, United States Army,
Appellant.

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29 Feb. 1984

Colonel William G. Eckhart, JAGC, Colonel R. Rex Brookshire II, JAGC, Major Michael T. Kelly, JAGC, and Captain Peter R. Huntsman, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel John T. Edwards, JAGC, Major Patrick M. Flachs, JAGC, and Captain Paul E. Jordan, JAGC, were on the pleadings for appellee.

Before HANSEN, COKER and BROOKSHIRE, Appellate Military Judges.

OPINION OF THE COURT

PER CURIAM:

The appellant was convicted contrary to his pleas, by the trial judge sitting alone as a General Court-Martial, of carnal knowledge, attempted sodomy, and lewd and lacivious acts with his daughter. The primary issue before the Court is whether he was denied his Sixth Amendment right to a public trial. We have determined, based on the facts of this case, that there was no error.

The thirteen year old daughter/victim was called as the prosecutor's first witness. Prior to her appearance, the prosecutor requested the courtroom be cleared for the purposes of creating an environment more conducive to relaxation and to reduce the amount of embarrassment to the witness. The only persons removed from the courtroom were the bailiff and the appellant's escort. It is not known whether any other persons were denied entrance to the court. Defense counsel objected on the basis that the bailiff and escort had duties in the court and that the witness had told her story repetitively before adults.

Based on the facts that there was no jury, the age of the victim, the extremely serious charges, and the relationship between the appellant and victim, the exclusionary order of the trial judge was not an abuse of discretion. Rather, we find that the trial judge properly balanced the right of the appellant to a public trial against the right of the victim/witness to be spared undue embarrassment. *United States v. Brown*, 7 U.S.C.M.A. 41 (sic), 22 C.M.R. 41 (1956). While the parties to the trial should have made a more complete record on the issue, we are convinced that the record is sufficient to establish the higher value of the victim's well-being as an overriding interest to that of a completely open hearing. *Press-Enterprise Company v. Superior Court*, —— U.S. ——, —— — ——, 104 S.Ct. 819, 822-824, 78 L.Ed.2d 629 (1984).

The remaining allegations of error are not meritorious.

The findings of guilty and the sentence are affirmed.

Judge BROOKSHIRE did not participate in this decision.

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